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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1173

HARRY R. HUGHES AND JOHN-CLARENCE NORTH,
Petitioners,

v.

W. F. STRONG, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on January 11, 1966, prior to opinion, and as modified by a further Order entered on March 2, 1966 at the time of the filing of the majority and dissenting opinions.*

* Additional parties respondent (who were plaintiffs in the original suit) are Newton I. Steers, Francis J. Fagan, John T. Doherty, Andrew M. Bristow, Samuel Hopkins, and the Maryland Committee for Fair Representation, an unincorporated association. The remaining Respondents are the state officials named as defendants in the suit as filed, namely, the Governor, Secretary of State, Comptroller, Attorney General, Treasurer of Maryland and the Clerk of the Maryland Court of Appeals, individually and as members of the State Board of Canvassers, and the members of the Board of Election Supervisors of Anne Arundel County.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court for Anne Arundel County (R. 288) is unreported and is printed in Appendix B, p. 23a. The majority and dissenting opinions in the Court of Appeals of Maryland (R. 308, 329) printed in Appendix B, pp. 38a, 55a, are reported in 241 Md. 471, ... A. 2d .....

JURISDICTION

The original judgment of the Court of Appeals of Maryland was entered on January 11, 1966. Appendix B, p. 37a. No reargument has been sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) since the validity of a state statute on grounds of repugnance to the Constitution of the United States is drawn in question. The validity of the statute in question, Md. Acts, 1965 Spec. Sess., Ch. 3, under the Equal Protection Clause of the Fourteenth Amendment was first drawn in question by the answer filed by the plaintiffs on November 3, 1965, to the state officials' petition for final decree (R. 249). The constitutionality of Ch. 3 has been the sole issue in these proceedings.

QUESTIONS PRESENTED

1. Whether a plan of reapportionment which establishes a large Senate in a state with an unusually small number of counties, validly affords "some independent representation to political subdivisions" where population and local subdivisions are the sole bases of apportionment, county government and "local legislation directed only to the concerns of particular political subdivisions" are of greater importance than in any other state, and the populous areas of the state are accorded substantially more than a 60% constitutional majority of seats in the Senate and three-fourths of the seats in the House of Delegates.

2. Whether a legislative apportionment plan which more than trebles the number of representatives of populous areas, moves more than three-fourths of the way toward a strict population standard, and affords populous areas 64% of one house and 75% of the other is valid for the 1966 election as a transitional plan where measures designed to alleviate the need for local legislation and county representation have been promptly proposed by the legislature and the necessary ratification processes to bring these changes into effect will require two to three years to complete and where permanent reapportionment cannot take place without constitutional amendment.

STATUTES INVOLVED

The statutory provisions involved are Md. Acts, 1965 Spec. Sess., Chs. 2 and 3. Ch. 3 by its terms and as construed by all parties to this litigation, and in all opinions below, is the legislature's preferred plan and will supplant Ch. 2 if its validity is upheld. The statutes are printed in Appendix A, pp. 1a, 12a.

STATEMENT

On August 12, 1960, the present lawsuit was instituted. With respect to the Senate, it sought an increase in that 29 member body by adding 14 new senators for urban and suburban areas for a total of 43. Each county would retain at least one senator (R. 234). During the ensuing two years, Respondent Maryland Committee for Fair Representation assisted in the defeat of several reapportionment plans, fearing their adoption "could moot a lawsuit." (Hanson, *Fair Representation Comes to Maryland* (Eagleton Institute: Cases in Practical Politics No. 35), McGraw Hill Book Co., New York 1964, p. 3). After *Baker v. Carr*, 369 U.S. 186 and *Maryland Committee v. Tawes*, 228 Md. 412, 180

A. 2d 656 (1962), the trial court on May 24, 1962, held the House of Delegates to be unconstitutionally apportioned (R. 170). On May 31, 1962, legislation was enacted allocating 19 additional seats in the House of Delegates to the suburban counties, Md. Code (1965 Repl. vol.), Art. 40, Sec. 42.

In July of 1962, a new gubernatorial commission on reapportionment was appointed, which included plaintiff Samuel D. Hopkins, and Professor Royce Hanson, president of the plaintiff Maryland Committee for Fair Representation. In September of 1962, the Maryland Court of Appeals, sustained the apportionment of the 29 member Senate. *Maryland Committee v. Tawes*, 229 Md. 406, 184 A. 2d 715 (1962). Later in the same month, the Governor's Commission, by unanimous vote, Professor Hanson and Mr. Hopkins joining, voted to defer further action pending this court's decision in the case.

In January 1964, the Governor's Commission filed its report (Stipulation Exhibit No. 7). The majority recommended certain changes only in the House of Delegates. Professor Hanson, Mr. Hopkins, and three other commission members, Dean Roger Howell of the University of Maryland Law School, Walter J. Bierwagen, representing the Maryland AFL-CIO, and Helen L. Koss, second vice-president of the Maryland League of Women Voters, dissented. Their report (Appendix C, p. 80a) was separately concurred in by Furman L. Templeton, President of the Baltimore Urban League. The dissent took the majority to task for its "unnecessary haste" in presenting a report prior to the decision of this Court (Appendix C, p. 80a). It endorsed "the guarantee of minimum representation for each county" based on the state's practice of local legislation (Appendix C, p. 92a). The minority report stated:

> We recommend that the Senate contain 47 members apportioned on the basis of population, except that every county and the City should be guaranteed one Senator, whatever its population * * *

In July, 1964, *Maryland Committee v. Tawes*, 377 U.S. 656 was decided. Subsequently the Legislative Council conducted hearings on reapportionment and on May 18, 1965, was advised by the Attorney General that: "[i]t would be fatal and unrealistic if you do not give the major metropolitan areas not only a just and fair majority, but also a working majority. He added that 64% certainly would be a working majority." Maryland Legislative Council, *Report to the General Assembly of 1966*, pp. 227-28. In formal opinions dated May 28, 1965, and September 21, 1965, the Attorney General retracted this view on an analysis of lower court decisions in other jurisdictions.

Against this background, the subject act providing for a 53 man senate and preserving one senator from each county was enacted and signed by the Governor on October 27, 1965. The bill was supported by senators from the 1st, 2nd, 3rd, 5th and 6th Districts of Baltimore City, and Baltimore and Anne Arundel Counties. In the House of Delegates the bill was supported by 24 delegates from the five populous subdivisions, including almost all of the Anne Arundel and Baltimore County delegates and nearly half of those from Montgomery County and the 4th District of Baltimore City. The act apportions senators among the counties and Baltimore City according to the mathematical method of equal proportions utilized in apportionment among the states of the United States House of Representatives, save that, in order to avoid redistricting Baltimore City's six districts, and the resultant danger of gerrymandering, two seats which would be awarded to Baltimore City, which has in both relative and absolute terms a de-

clining population, are instead awarded to Montgomery and Prince George's Counties, the two fastest growing subdivisions in the state. Ch. 3 provides for a House of 142 members also apportioned among the subdivisions on the basis of the equal proportions method.

At the same session of the legislature, an alternate plan, Ch. 2 was also enacted (Appendix A, p. 12a). This plan likewise provides for a 142 member House, districted and apportioned on the same basis as Ch. 3. It provides for a 43 member senate running from artificial districts created by combining up to 5 counties.

Following the legislative session, the Attorney General petitioned the Trial Court to dismiss the original complaint on the ground of compliance with this Court's mandate by virtue of the enactment of the two statutes (R. 242). Respondents, plaintiffs below, by their answer, asserted that the Senate features of the preferred plan, Ch. 3, violated the Equal Protection Clause of the Fourteenth Amendment.[1]

Since the Attorney General of Maryland had rendered an opinion that the preferred plan was invalid and consequently appeared below adversely to it, Petitioners here, the legislative sponsors of the plan, intervened as defendants.[2]

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[1] This was the sole issue in all litigation below. The Maryland Constitution contains no equal protection clause. No challenge was made to the alternate plan or to the House provisions of either bill by any of the parties. All other issues raised in Respondents' Answer were expressly abandoned at a pre-trial conference.

[2] See *Honsey v. Donovan*, 236 F. Supp. 8, 10 (D. Minn. 1965); *Silver v. Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1965) holding state senators entitled to intervention as of right in reapportionment litigation. Cf. *Reynolds v. Sims*, 377 U.S. at 548; *Lucas v. Colorado General Assembly*, 377 U.S. at 716.

The Circuit Court for Anne Arundel County delivered an opinion on December 29, 1965 (Appendix B, p. 23a) holding the Senate provisions of Ch. 3 invalid and upholding the Senate provisions of Ch. 2 and the House provisions of both Acts. The court also retained jurisdiction until June 1, 1966. An appeal was taken to the Court of Appeals of Maryland which on January 11, 1966, one day after argument, handed down a per curiam order (Appendix B, p. 37a) affirming the judgment. On March 2, 1966 the Court of Appeals, dividing 5 to 2, filed its opinions. The court added to its prior order a direction "that the trial court retain jurisdiction at least until after the 1966 General Elections."[3] The majority opinion impliedly adopts the sort of rigid mathematical standard repudiated by this Court in *Roman v. Sincock*, 377 U.S. at 710 whereas the dissenting opinion relied heavily on an analysis of this language from *Reynolds v. Sims*, 377 U.S. 533, 580-81:

> Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many states much of the legislature's activity involves the enactment of so-called

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[3] It is thus doubly plain that this petition involves a subsisting case and controversy, and that the jurisdiction of this Court ultimately to decide federal constitutional questions is not defeated (assuming, contrary to fact, that it otherwise could be) by the Maryland Legislature's direction in Sec. 4 of Ch. 3 that Ch. 2 should be ineffective "in the event this act shall be declared valid by the Court of Appeals of Maryland." See Hart & Wechsler, *The Federal Courts and the Federal System* (1953), 123; *So. Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911); *Ford Motor Co. v. U. S.*, 335 U.S. 303, 313 (1948). Ch. 3 was enacted after Ch. 2, and the language in Sec. 4 conditions the operation only of Ch. 2 not of Ch. 3. As acknowledged by Respondents below, Sec. 4 does nothing more than restate the common law rule that where statutes passed at the same session of the General Assembly "are irreconcilably inconsistent, the latest in point of time will prevail." *Elgin v. Capitol Greyhound Lines*, 192 Md. 303, 317, 64 A. 2d 284, 291, aff'd, 339 U.S. 542 (1952). A mandate from the Court of Appeals sustaining Ch. 3 after a decision by this Court would plainly satisfy the act.

local legislation, directed only to the concerns of particular political subdivisions. And a state may legitimately desire to construct districts on political subdivision lines to deter the possibilities of gerrymandering. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county), could easily result, *in many states,* in a *total subversion* of the equal population principle in that legislative body. This would be especially true in a state *where the number of counties is large and many of them are sparsely populated,* and the number of seats in the legislative body being apportioned *does not significantly exceed the number of counties.* (377 U.S. at 581) (E.S.)

REASONS FOR GRANTING THE WRIT

1. The instant matter presents a question of importance for all states in which the number of subdivisions is not large.

Fourteen American states have fewer than 25 counties, as follows: Delaware 3, Rhode Island 5, Hawaii 5, Connecticut 8, New Hampshire 10, Arizona 14, Massachusetts 14, Vermont 14, Maine 16, Nevada 17, New Jersey 21, Wyoming 23, Maryland 24, Alaska 24. These states have it within their capacity to create legislative houses in which "the number of seats in the legislative body being apportioned * * * significantly exceed(s) the number of counties," and in which populous areas would not be deprived of effective majority rule. Many of them have done so, and their courts are in disarray as to the constitutional validity of the results. In Massachusetts, a court-appointed commission framed a reapportionment plan, placed in force by the legislature, containing disparities of up to 5 to 1 between the largest and smallest districts. See Mass. Gen. Laws 1963, c. 666, *White v. Denman,* 34 F.R.D. 252 (D. Mass. 1963), appeal dismissed 379 U.S. 28 (1964). In New

Jersey (*Jackman v. Bodine*, 44 N.J. 414, 209 A. 2d 825 (1965) and 44 N.J. 453, 205 A. 2d 713 (1964)) and Wyoming (*Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964)), plans containing disparities considerably in excess of 2½ to 1 between largest and smallest districts have been unanimously upheld. In Vermont (*Buckley v. Hoff*, 234 F. Supp. 191 (D. Vt. 1964)) and Arizona (*Klahr v. Goddard*, ... F. Supp. .... (D. Ariz. 1966)), plans with disparities of 5 to 1 in the first case and 7 to 1 in the second have been invalidated. In the Vermont case, the court stressed the "unimportance" of counties in that state. In the Arizona case the court split 2 to 1. The above cases, taken together with the sharp division in the Maryland case, indicate that great uncertainty exists as to the proper interpretation of the "local subdivisions" qualification in *Reynolds*. Similar issues may arise in Alaska, (see Alaska Const., Art. VI) and Maine (see Me. Const., Art. IV, pt. 2, §1, Me. Sess. Laws 1961, c. 120), among other jurisdictions.

2. The decision below would seem clearly erroneous in view of the above-quoted language in this Court's opinion in *Reynolds*. This Court made clear that independent representation for local subdivisions was permissible in "either or *both*" (377 U.S. at 579) or "*at least* one" (377 U.S. at 580-81) of the houses of a state legislature (emphasis supplied). This Court by stating that "in many states" (377 U.S. at 581) this would not be permissible, made clear its belief ~~that in~~ at least some states it would be. The criteria advanced for identifying the states in which some independent representation for subdivisions was allowable were as follows:

a) that population not be "totally subverted" (377 U.S. at 581) or "submerged" (377 U.S. at 581), and that "a majority of the people of a state should elect a

majority of that state's legislators" (377 U.S. at 565). That criterion is met by the subject plan which gives a full 64% of the Senate to "five most populous subdivisions of Maryland — the counties of Anne Arundel, Baltimore, Montgomery and Prince George's and the City of Baltimore", identified and referred to in *Maryland Committee v. Tawes*, 377 U.S. 656, 664. That is not only a majority, but it exceeds the constitutional three-fifths majority required to propose amendments to the Maryland Constitution (Md. Const. Art. XIV, Sec. 1), to enact emergency legislation (Art. XVI, Sec. 2), and to override a veto by the Governor (Art. II, Sec. 17).

Purely mathematical standards have been rejected in determining whether votes are "in a substantial fashion diluted" (377 U.S. at 568). See *Roman v. Sincock*, 377 U.S. at 710. The limitations of two frequently used mathematical standards, the "theoretical majority" and "argument from extremes" are documented in Schubert and Press, *Measuring Malapportionment*, 58 Am. Pol. Sci. Rev. 302 (1964); see also Clem, *Measuring Legislative Malapportionment*, 7 Midwest Journal of Political Science 125 (1963). Under the "Index of Voting Power," suggested in the latter article, the Maryland subdivisions with 75% of the population have fully 70% voting power under the subject plan (Appendix C, p. 77a). The Clem approach seems logical in light of this Court's insistence that the two houses of the legislature be viewed together.

Moreover, as Table 3 in Appendix D, p. 100a, makes clear, all but eight counties would be entitled to one Senator in a 53 man Senate, apportioned according to the recognized 'major fractions' method, and these eight counties have a combined population which would

entitle them to three senators. Thus, according to the analysis utilized in *Jackman v. Bodine,* 44 N.J. 414, 209 A. 2d 825 (1965), only five senators or 9% would be required to be apportioned differently on a strict population basis. If full ideal ratios, in lieu of major fractions are used, the 15 counties lacking a full ratio have a combined population entitling them to 8 seats. Thus only seven seats would have to be apportioned differently on a full ratio basis and the 53 man senate would be 87% on the basis of population.

The focus of any mathematical approach should be on under rather than over representation. Comment, *A Comprehensive Survey of Redistricting or Reapportionment Law.* 48 Marquette L. Rev. 516, 520-21 (1965); Hanson, *Courts in the Thicket,* 12 Amer. U.L. Rev. 51, 77-78 (1963); White and Thomas, *Urban and Rural Representation and State Legislature Apportionment.* 17 Western Pol. Q. 724, 728 (1964). None of the urban or suburban districts and only one rural district are underrepresented by the 50% suggested as the maximum allowable underrepresentation in *Drew v. Scranton,* 229 F. Supp. 310, 327-28 (D. Pa. 1964), 379 U.S. 40 (1964) and *Sincock v. Roman,* 215 F. Supp. 169, 190 (D. Del. 1963), and the underrepresentation is far less than that allowed by the British Boundary Commissioners in respect to the larger British constituencies. See note 10, *infra.*

Application of the method and standard enunciated in White and Thomas, *supra,* makes plain that residents of urban areas are not prejudicially underrepresented. The writers suggest that in order for a plan to be sustainable, the weight of urban votes as determined by application of their formula should be no less than .90 in the more popular house and .75 in the house

apportioned partly on the basis of subdivisions. The old Maryland legislature plan invalidated in *Maryland Committee v. Tawes,* yielded indices of .79 for the House and .60 for the Senate, and gave rural areas an artificial majority in the Senate. The urban indices for the subject plan, by contrast, are .993 for the House and .866 for the Senate, figures which far more than meet the White-Thomas standard for a sustainable plan.

Mathematical approaches may be of significance in evaluating reapportionment plans for which there is no real local subdivisions justification, since such approaches then evidence that a factor other than the two permissible ones — population and local subdivisions — must have been used. However, where, as here, there is a most substantial local subdivisions justification, the standard is that population not be "submerged," As shown above, it is submitted this standard is met by the instant plan.

b) that the plan be based on "legitimate considerations incident to the effectuation of a rational state policy" (377 U.S. at 579). This criterion is met by the present plan, unlike all the plans hitherto involved in cases to which this Court has given consideration. The sole bases of apportionment here are population and minimum representation for political subdivisions. This case does not involve representation on the basis of square miles, cf. *Marshall v. Hare,* 378 U.S. 561 (1964), or arbitrary discrimination against specific urban areas, cf. *Davis v. Mann,* 377 U.S. 678 (1964); or use of a complex formula or artificial districts which heavily disenfranchise urban areas as such, cf. *W.M.C.A. v. Lomenzo,* 377 U.S. 633 (1964); *Lucas v. Colo. Genl. Assembly,* 377 U.S. 713 (1964); or arbitrary districts

frozen into the state constitution at an earlier time, cf. *Roman v. Sincock*, 377 U.S. 695 (1964); or equal representation of political subdivisions on the basis of the so-called 'federal analogy', cf. *Maryland Committee v. Tawes*, 377 U.S. 656 (1964); or use of minimum representation in states with large numbers of counties in which only a small fraction of seats were awarded on a population basis, cf. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Swann v. Adams*, 377 U.S. 553 (1964); and *Anderson v. Harris*, 382 U.S. 894 (1965). Rather it involves use of a rational formula, giving heavily predominant weight to population, designed to meet pressing needs arising from the structure of government in a state. The President of the Respondent committee has noted that this sort of justification for departures from a population standard was not argued in any of the cases before the Supreme Court. See Hanson, *The Political Thicket* (Prentice-Hall, Inc., 1966), 113. The decisions in *Reynolds* and its companion cases invalidated various invidious classifications devised by the states. They did not purport to bar the states from choosing among reasonable means of classification, nor did they impair the traditional rule that the 14th Amendment's "function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921); *Baker v. Carr*, 369 U.S. at 244, 245 (Douglas, J. concurring).

c) that the number of political subdivisions in the state not be "large" (377 U.S. at 581). Maryland has only 24 political subdivisions — fewer than all but 12 states (Appendix D, p. 98a). Moreover nearly all the states with fewer counties are New England and Western states in which county government is rela-

tively unimportant. See *Liggett Co. v. Lee*, 288 U.S. 517, 581 (Cardozo, J., concurring); 1 Bryce, *American Commonwealth* (2d ed.), 570-71.

d) that the state not have "many sparsely populated subdivisions" (377 U.S. at 581). In Maryland, the smallest subdivision — Kent County — has a substantial population — 15,481. Maryland has no small counties with a few hundred or a few thousand persons. Art. XIII, Sec. 1 of the Maryland Constitution of 1867, forbidding creation of new counties with less than 400 square miles, effectively prevented proliferation of small counties. See Maryland Geological Survey, *The Counties of Maryland: Their Origin, Boundaries and Election Districts* (1907), at 426. In only five American states with county government — Delaware, Maine, New Hampshire, New Jersey, and Rhode Island — does the most sparsely populated county have more persons than Kent County.

e) that the "number of seats in the legislative body being apportioned * * * significantly exceed the number of counties" (377 U.S. at 581). This criterion is met by a 53 man Maryland Senate. The ratio of seats to subdivisions is 2.2 to 1. If the suggestion in *Reynolds v. Sims*, 377 U.S. at 579, that at least some states would be able to afford independent representation to subdivisions in "both" houses of their state legislature is not to be rendered a dead letter, the subject plan should be upheld. In only five states with county government — Rhode Island, Delaware, Hawaii, Massachusetts, and New Hampshire, did the ratio of seats in the upper house to subdivisions as of June, 1964, exceed that in Maryland, and in all these states county government is relatively unimportant (Appendix D, p. 99a).

f) that "local governmental entities * * * (be) charged with various responsibilities incident to the operation of state government." In Maryland, counties are of great and perhaps unequalled importance as administrative units. Eleven of the present counties were in existence as of 1695. Maryland Geological Survey, *supra,* 429-572. Local health services, jails, libraries, real property assessments, soil conservation programs, the court system and prosecutors' offices are organized on a county basis. See *Maryland Manual* (1961-62), pp. 69, 99, 116, 347 ff. Seventeen of the 23 counties maintain, construct, and reconstruct their own road systems. Education, the most important function of state government, is organized entirely on a county basis. Maryland has 24 county school boards and not a single independent school district, the state retaining only limited visitorial powers. Only four other states, Hawaii, Rhode Island, Virginia, and North Carolina have no independent school districts. See Andrews, *History of Maryland* (1929), 638-39; Anderson, et al., *Government in the Fifty States* (Rev. ed. 1960), 24-5; U.S. Census of Governments, Vol. 1, No. 1, Table 1, p. 14 (1957). On the other hand, municipal (town) government outside of Baltimore City has never developed beyond a rudimentary state. The state's largest county, Baltimore County, has not a single incorporated municipality. The five largest communities in the state outside of Baltimore City are not incorporated municipalities. Maryland ranks only 48th among 51 American jurisdictions in the number of local governments per 100,000 inhabitants. See Spencer, *Contemporary Local Government in Maryland* (1965) p. 3. These facts render nugatory as to Maryland, the arguments against county representa-

tion put forward by advocates of a strict mathematical formula, e.g. "it is difficult to conceive that (the county) is inherently more significant than cities, villages, or even special purpose districts. School districts, for example, probably touch political emotions and the voters' pocketbooks more than any other body with governmental authority." McKay, *Reapportionment* (1965), p. 253. In Maryland, the county and local governments account for about 50% of the revenues and about 70% of the combined expenditures of government. If highway expenditures are left aside, 75% of government expenditures are made below the state level. *Interim Report of the Maryland Commission on State and County Finance* (1965), p. 2. By this quantitative standard Maryland counties are more important in relation to the state government than are the states in relation to the federal government. Their separate representation in directly elected legislative bodies is a felt need, reflected in every legislative apportionment since 1654. Michener, *The History of Legislative Apportionment in Maryland*, 25 Md. L. Rev. 1 (1965); *Maryland Committee v. Tawes*, 228 Md. 412, 434, n. 11.

g) that "much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions." This criterion is met in Maryland to an extent unequalled in the nation. "Maryland seems to be the only State in the Union having a published code of public local laws." Maryland Legislative Council: *Local Government: A Comparative Study*, Research Report No. 23 (September 1944), p. 21. In the 1963 session of the Legislature 629 local bills were introduced, including 219 Senate bills. Bell and Spencer, *The Legislative Process in Maryland* (1963 ed.) p. 87.

As noted by the late Professor V. O. Key, former Professor of Government at Harvard and former president of the American Political Science Association in his 1940 report to the Legislative Council, *The Problem of Local Legislation in Maryland,* each local bill and each of the numerous amendments thereto must have necessitated the same number of conferences with county commissioners and constituents. The Maryland practice in respect to local legislation is unique in that, as this court noted in sustaining its validity in *Salsburg v. Maryland,* 346 U.S. 545 (1954), and *McGowan v. Maryland,* 366 U.S. 420, 427, 537 (1961), each county delegation serves as a miniature legislature for each county. The holding of the *Salsburg* and *McGowan* cases was reaffirmed in *So. Carolina v. Katzenbach,* 34 L.W. 4207, 4214 (decided March 7, 1966). "Every one of the other forty-seven states has one or more standing committees to which the local bills of *all* counties may be referred." Maryland Legislative Council, Research Report No. 23, *supra,* at 17. All students of the system recognize that its impact on present Maryland law makes it impossible to abolish the system overnight. See Key, *supra,* p. 1 ff. and Spencer, *supra,* p. 30. All students of reapportionment in Maryland, including the President of the respondent committee, have recognized the need for maintaining separate county representation in both houses, at least for a transitional period. See the Minority Report of the Governor's Commission on Reapportionment of the General Assembly (1964), p. 29 (Appendix C, p. 93a); Dixon, *Apportionment Standards and Judicial Power,* 38 Notre Dame Lawyer 367, 391 (1963); League of Women Voters of Maryland. Publication No. 072 (1960), p. 2. Spencer, *supra,* p. 26 ff.

It is thus plain that all the criteria enunciated in *Reynolds v. Sims* for allowing independent representation to local subdivisions have been more than met in Maryland. Just as this Court has given vitality to the language of *Reynolds* indicating flexibility in the formation of multi-member districts, so should this Court give vitality to the "local subdivisions" qualification by reviewing the erroneously restrictive interpretation of the qualification made by the Court of Appeals of Maryland. See *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Boineau v. Thornton*, 379 U.S. 15 (1965); *Burnette v. Davis*, 382 U.S. 42 (1965); *Harrison v. Schaefer*, ... U.S. ..... (1966); *Yancey v. Faubus*, ... U.S. ..... (1966).

3. The need for orderly development of the law requires that the Court give further plenary consideration to reapportionment problems.

All commentators on the July, 1964, reapportionment decisions have recognized that these decisions represent merely the "first round" of reapportionment litigation, and that renewed consideration by the Court will be necessary and appropriate in order to clarify the language about "local subdivisions." Thus the President of the American Political Science Association has pointed to the "local subdivisions" language and has noted that "the Court's one-man one-vote rule may not be as rigorous as it sounds. Chief Justice Warren's opinion in *Reynolds v. Sims* specifically disclaimed the intention 'to spell out any precise constitutional tests.'" Pritchett, *Equal Protection and the Urban Majority*, 57 Am. Pol. Sci. Rev. 869, 872 (1964). The Committee on Federal Legislation of the Association of the Bar of the City of New York, in opposing a constitutional amendment to overturn the *Reynolds* decision, has urged "allowing time for development of doctrine * * *. The

only factor expressly mentioned by the Court as justifying departure from equal population districts was the recognition of a state's political subdivisions in view of their place in state governmental administration. What variations will be permitted from the equal-population principle to take account of particular circumstances and whether such variations will satisfy some of the objections to the decisions remains to be seen, but the Court appears to have left the door open."[4] Professor Robert B. McKay observed: "The Supreme Court made it clear in the original decisions that there is considerable room for variation of formula depending, for example, on the governmental role played by local political subdivisions in the various states. * * * (W)e haven't had time to work out these things. The Supreme Court, it seems to me, has a great deal of good sense about problems of this character and they work them out over a period of time, and they will be responsive to the real needs."[5] Former Attorney General Robert F. Kennedy stated at the same hearings: "The Court said it would permit 'some deviations from the equal population principle' based on legitimate considerations incident to the effectuation of a rational State policy. *The content of that exception deserves to be worked out on a case-by-case basis.*"[6] (Emphasis added.)

Dean Jefferson Fordham of the University of Pennsylvania Law School observed that "(the court) has said, however, that in using local units of government as representative districts, a state may depart to a limited extent, from the one-man, one-vote principle. In keeping with the

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[4] *Reapportionment of State Legislatures.* Hearings before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 89th Congress, 1st Session (1965), p. 251.

[5] Id., pp. 436, 443.

[6] Id. at p. 776.

realities of the local government configuration, it is reasonable to expect that there will be further extrapolation in cases yet to be decided."[7] Former Solicitor General J. Lee Rankin has noted that "the court was very careful to recognize that we did have fifty different states with numerous different problems in this area, and that a good-faith attempt to try to reach the problem on the basis of one man, one vote, and make adjustments for special needs of a state would be recognized as something reasonable under our constitution and its requirements."[8]

Perhaps even more significant as indicating the general understanding of this Court's decision in *Reynolds v. Sims* and its probable and appropriate future course is the following colloquy between Mr. R. Peter Straus, the plaintiff in *W.M.C.A. v. Lomenzo*, 377 U.S. 633 (1964), and the Chairman of the Subcommittee on Constitutional Amendments, Senator Tydings:

> Senator Tydings: You mean you could see logic to the present apportionment plan of the Maryland State Senate which has been approved by the House but not by the Senate which increases the size of the Maryland Senate from 29 senators to 53 senators, thereby providing that every small county which now has a senator still has a senator, but the great tremendous suburban areas of our state in which 78 percent of the people reside would have an equal voice or an equal share of the vote and procedures in that particular house. Is that what you are saying?
>
> Mr. Straus: It seems to me logical, yes.[9]

4. Strong reasons in policy exist for allowing the states reasonable leeway in according representation to local subdivisions.

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[7] Id. at p. 930.
[8] Id. at pp. 873-74.
[9] Id. at p. 638.

This Court has recognized that "more flexibility may * * * be constitutionally permissible with respect to state legislative apportionment than in congressional districting" (377 U.S. at 578). Such greater flexibility is justified by the greater number of seats to be distributed in state legislatures. Also, it is to be recollected that "the powers of the general government are limited, and embrace only such objects as are of a national character. * * * The knowledge required of a national representative is, therefore, necessarily of a more large and comprehensive character than that of a mere state representative. Minute information, and a thorough knowledge of local interests, personal opinions and private feelings are far more important to the latter than the former." *Story on the Constitution*, Sec. 659 (2d Ed. 1851). Effective service as a state senator requires long knowledge of local and, more particularly, county, institutions and officials — knowledge not as likely to be possessed when a senator must represent three or four counties other than that in which he resides and with whose politics he has long been familiar. Considerations of this nature seem to have induced this Court to refrain from passing on reapportionment decisions applicable to county boards. See *Glass v. Hancock County Election Comm.*, 378 U.S. 558 (1964); *Griffing v. Bianchi*, 382 U.S. 15 (1965).

Moreover, the effect of a decision invalidating the subject plan would be to make difficult orderly consideration of local legislation, by depriving counties of representation in one house of what is in effect their local legislature. This Court has refused to prevent even seriously malapportioned legislatures from continuing effectively to act as such, see *Fortson v. Toombs*, 379 U.S. 621 (1965); *Parsons v. Buckley*, 379 U.S. 359 (1965), cf. *Baker v. Carr*, 369 U.S. 186, 250 n. 5.

Invalidation of the present plan would also impair the viability of counties as political units. The strength of the counties has been recognized as one of the most progressive and admirable features of Maryland government. Maryland has avoided the political splintering into overlapping legislative, school, taxing and other districts characteristic of many jurisdictions. This overlapping, and resulting lack of coordination between different levels of government, has long been a source of concern to political scientists. See for instance the study of the New York Metropolitan Area by the recently appointed Undersecretary of Housing and Urban Development. Wood, *1400 Governments* (1960). Others have condemned "an approach (which) makes no allowance for the functional interrelationship of different levels of government." King, *The Reynolds Standard and Local Reapportionment,* 15 Buffalo L. Rev. 120, 141 (1965). The survival of counties as separate electoral units is relevant to their survival as viable governmental entities, just as the role of the states as electoral units in congressional and presidential elections is essential to a viable federalism. See Wechsler, *The Political Safeguards of Federalism,* 54 Colum. L. Rev. 543 (1954).

Likewise, there is a compelling case for allowing districts to be constructed on a county basis to insure continuity in contact with constituents and to minimize costs of seeking office. The President's recent State of the Union Message expressed great concern about costs which discourage men of modest means from seeking election. Considerations of a similar sort have been responsible for the changes made in recent years in legislative apportionment in Great Britain. In 1946 an earlier requirement that districts ordinarily not deviate from the norm by more than 25% was found to be "far too rigid" and was eliminated. Butler, *The Electoral System in Britain Since 1918* (2d ed.

1963), 214. The apportionment carried out pursuant to the revised provisions produced disparities between largest and smallest districts of more than 4 to 1.[10] Further amendments in 1958 had the agreement of all parties. 6 & 7 Eliz. 2, Ch. 26, see H.C. Deb. 583, c. 226-301, 585, c. 599-700, 1297-1305. Those amendments erect a presumption in favor of "preserving the status quo in areas where such a course appeared to be desirable and not inconsistent with the broad intention of the rules." The next apportionment will probably further increase disparities. See Richards, *Honorable Members* (1959) 44-49.

This Court referred approvingly to the British experience in *Reynolds v. Sims,* 377 U.S. at 568 n. 44. Professor Robert B. McKay has referred to it as exemplifying "the kind of flexibility that I think might be ordained by the Supreme Court if given an opportunity to work out these matters."[11] The British movement away from strict mathematical equality in the last twenty years rests on a realization that such a rule had adverse effects on the quality of representation. "Liberals had always assumed that the extension of the franchise would extend the popular basis of Parlia-

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[10] As of the 1964 election, the electorate in the seven smallest British constituencies was as follows: Western Isles, 23,699; Ross and Cromarty, 24,777; Orkney and Zetland, 25,481; Merioneth, 26,392; Caithness and Sutherland, 27,291; Kelvingrove, 28,407; Ladywood, 29,735. Other small constituencies included Leeds Southeast, 33,326; Glasgow Central, 30,465; London (Bermondsey) 35,845. The seven largest constituencies were Antrim South, 105,315; Down North, 97,151; Billericay, 96,762; Epping, 94,655; Portsmouth (Langstone) 91,587; Hornchurch, 90,828; Hitchin, 87,825. Nor were these isolated disparities; 94 constituencies had over 70,000 voters while 41 had fewer than 40,000, the optimum figure being 56,498. London *Times,* October 17 and 19, 1964. See Starzinger, *The British Pattern of Apportionment.* 41 Virginia Quarterly Review 321 (1965) on the general satisfaction with these arrangements.

[11] Hearings, *supra.* note 4, at p. 456.

ment without otherwise changing its nature and it was perhaps natural for them to be slow to realize that this was not to be the case. In practice the second Reform Act led to a growth of party organizations in the country and the development of the means by which party leaders could discipline their back-bench supporters. Members had to secure the voters of an electorate too numerous to be canvassed personally by the candidates, who therefore became dependent on the endorsement and support of a party organization." Birch, *Representative and Responsible Government* (1964) at 74. See Starzinger, *supra* at n. 10.

The arguments against proportional representation and elections at large also apply to other mathematically perfect arrangements which create fluctuating constituencies at the expense of community representation. In writing of countries that have used the former devices, Professor Lindsay Rogers of Columbia University observed "The rotten borough system has returned. Party machines determine the candidates who will have constituencies where nomination is equivalent to election, or who shall lead the lists of candidates when proportional representation is used." Rogers, *The Pollsters* (1949) at 221. It is desirable to maintain at least some stable political "societies small enough for their members to have personal acquaintance with each other, and to find their station through the appraisal of those who have first hand knowledge of them." Learned Hand, in *Proceedings of the Bar of the Supreme Court in Memory of Mr. Justice Brandeis,* 317 U.S. xi, xiv (1942).

It also is significant and not accidental that the subdivisions "overrepresented" under the subject plan are generally the subdivisions with the lowest per-capita income,

not areas that are prosperous and hence expanding.[12] Representation of subdivisions as such thus operates, by giving poorer and hence depopulating areas added influence in the legislature, to mitigate economic inequalities and further currently important national objectives. See Dahl, *A Preface to Democratic Theory* (1956) 145-51.

Likewise, it may be desirable slightly to limit representation of rapidly developing areas where political institutions have not become as stabilized. "Mobility has created neighborhoods of strangers and jurisdictions without traditions * * *. In this context, alienation from the political process, nonparticipation in the official system of politics or support for mass movements as an anti-politics reaction appears to be increasing in metropolitan areas." Hanson, *The Political Thicket* (1966), 132. Cf. *Drueding v. Devlin*, 380 U.S. 125 (1965) dismissing a challenge to Maryland's county residence requirement for voting in presidential elections. If such considerations can justify complete and purposeful disqualification of voters in statewide and even presidential elections, it would seem to follow *a fortiori* that they can justify somewhat reduced weight for votes in districting where this is an incidental result of other rational considerations.

5. The present case is especially appropriate as a vehicle for renewed consideration of apportionment questions.

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[12] The per capita income of Maryland subdivisions arranged in descending order of precise mathematical overrepresentation is as follows: Kent $1,115, Calvert $945, Queen Anne's $1,064, Caroline $1,117, Somerset $797, Garrett $731, Talbot $1,506, Worcester $998, Dorchester $1,141, Charles $1,230, Howard $1,944, St. Mary's $747, Cecil $1,113, Wicomico $1,349, Carroll $1,389, Montgomery $2,615, Prince George's $1,859, Anne Arundel $1,560, Baltimore County $2,167, Frederick $1,360, Harford $1,466, Baltimore City $1,634, Allegany $1,514, Washington $1,427. Interim Report of the Commission on State and County Finance (1965) p. 101.

The facts of the instant case present the case for separate county representation at its strongest. Likewise, they afford the Court an opportunity to clarify the extent of the discretion given state courts of equity in taking into account the exigencies imposed by time factors in providing for transition to more equitable representation. This Court has made plain that some leeway is left to the states in providing for orderly transitional arrangements. See *Roman v. Sincock*, 377 U.S. 695 (1964); *Hill v. Davis*, 378 U.S. 565 (1964); *Martin v. Bush*, 376 U.S. 222 (1964); *West v. Carr*, 378 U.S. 557 (1964); *Reynolds v. Sims*, 377 U.S. at 586-87. In the Maryland case, this Court recognized that the legislature could enact "temporary reapportionment legislation pending adoption of state constitutional provisions which comport with federal constitutional requirements" (377 U.S. 675-76). The Maryland legislature enacted a preferred plan more than trebling the representation of populous counties in the Senate, and also proposed a constitutional amendment as the first step in a process to reduce the need for local legislation (Acts 1965, ch. 493). Preparations are being made for a constitutional convention which will frame permanent apportionment provisions (Acts 1965, ch. 298, p. 421). It is respectfully submitted that the Court of Appeals erred in not considering that the need for orderly transitional arrangements to deal with local legislation could render the plan "a constitutional plan" for purposes of the 1966 election within the meaning of the language in *Maryland Committee v. Tawes*, 377 U.S. at 676 forbidding elections under "the existing or any other unconstitutional plan."

This Court thus has leeway in this case either to consider generally the "local subdivisions" problem or to render a judgment limited to the 1966 election, since the statute contains a severability clause (Sec. 3), questions

of severability in apportionment cases are questions of state law, *Forty-Fourth General Assembly of Colorado v. Lucas*, 379 U.S. 693, and it is plain that the 1966 election provisions would be severable under state law, *Baltimore City v. Stuyvesant Co.*, 226 Md. 379, 391, 174 A. 2d 153 (1963).

Ample time remains for this Court to render a judgment effective for the 1966 elections, since under the terms of Code (1965 Supp.) Art. 33, Sec. 62(a), primary elections are not to be conducted until September 13, 1966. The filing deadline for such primary elections is set by Code (1957) Art. 33, Sec. 56 at midnight, July 5, 1966.[13] The parties to this litigation have agreed at all of its stages to expedite consideration of it. The case was argued in Anne Arundel County Circuit Court barely three weeks after notice of intervention was filed, and was argued before the Court of Appeals of Maryland 12 days after entry of the trial court's decree.[14] Cf. the stay and order in *Parsons v. Buckley*, 379 U.S. 942 (1964).

CONCLUSION

The process of reapportionment has now taken place in nearly every state, including Maryland, and the "rural stranglehold" (377 U.S. at 674 n. 19) which this Court sought to remedy has been broken everywhere. The issues presented in the long-awaited "second round" of cases which have begun to appear on this Court's docket relate

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[13] Even if the case were heard thereafter, it would not be moot, since the plan could be made effective for the 1970 election.

[14] This petition for certiorari was filed within approximately 30 days of the rendition of opinions by the Court of Appeals. Cf. *Shub v. Simpson*, 340 U.S. 861 (1950), where this Court declined to review election cases on the basis of lower court orders unaccompanied by opinions.

less to the allocation of representation among areas in a state and more to the nature of the relationship of a representative to his constituents. The issues now relate not to whether the predominant forces in the community will be able to make their weight felt, but rather to whether representatives are to retain significant and continuous relationships with their districts.

Demands for mathematical perfection in apportionment and the creation of fluctuating constituencies crossing community boundaries may result, not in more representative and effective legislatures, but rather in making legislators overly dependent on the favor of political machines and pressure groups, agencies of mass communications, and the executive branch of government. If future historians are not to apply to the rules on reapportionment the words of Milton, "new presbyter is but old priest writ large," application and interpretation of the Court's earlier opinions is called for in a case in which the arguments for giving effect to the local subdivisions qualification apply with maximum force.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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